80.0 Ethics

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ETHICS

*The spirit and soul of Judicial Ethics are embodied in Canon 1: "**A judge shall uphold the integrity and independence of the judiciary**" and Canon 2: "**A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.**" If we judges take to heart these two simple principles, all other proscriptions of the Canons will follow as logical extensions.*

80.01 RECUSAL – THE APPEARANCE OF IMPROPRIETY

"Judges are credited with ability to remain objective notwithstanding their having been exposed to information which might tend to prejudice lay persons." Jaske v. State, 553 N.E.2d 181 (Ind. App. 1990).

The TEST for determining if a judge must recuse is embodied in Canon 3(E)(1) which provides that "***[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned***." Our Supreme Court has stated that recusal is required if an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality. Timberlake v. State, 753 N.E.2d 591 (Ind. 2001). See also, Tyson v. State, 622 N.E.2d 457 (Ind. 1993).

While a trial judge has the discretion to disqualify whenever any semblance of judicial bias or prejudice arises, disqualification is not required unless actual prejudice or bias exists, Harvey v. State, 751 N.E.2d 254 (Ind.App. 2001), or the Canon 3(E)(1) test applies. However, the Code of Judicial Conduct includes commentary to Canon 3, which states that a judge should disclose on the record information that the judge believes the parties, or their lawyers, might consider relevant to the question of disqualification, even if the judge believes that there is no basis for disqualification.

A. The mandatory disqualifiers listed in Canon 3 **may not** be waived even if all counsel and parties are willing to do so. A judge must disqualify in the following categories of cases:

   1. Where the judge is related to a party or an attorney in the case.

      a. Indiana Code § 33-2.1-8-2 and Canon 3(E)(1)(c) and (d) and T.R. 79(C) all require recusal. This applies not only to the judge but also to the judge's spouse, or any person within the third degree of relationship to either of them or the spouse of such person. Although "degree of relationship" is defined in the "Terminology " section of the Canons, the definition does not address stepchildren, stepparents or half siblings. Further, there is no guidance as to widowed or divorced relationships. In such cases the test for disqualification is the general rule of Canon 3(E)(1); *i.e.*, if the judge's impartiality might reasonably be questioned.

      b. Per T.R. 79(C) and Canon 3(E), the related person must be:
         (1) a party or an officer, director, or trustee of a party;
         (2) a lawyer in the proceeding;

(3) known by the judge to have an interest that could be substantially affected by the outcome; or
(4) to the judge's knowledge likely to be a material witness.

c. "Economic Interest" is also defined in the "Terminology" section of the Code of Judicial Conduct and, unless the case might substantially affect the value of the interest, **excludes**: mutual fund securities in most instances, investment holdings of civic, educational, religious, charitable or fraternal groups where the related person is an officer; deposits in financial institutions, proprietary interests or policy holder status in a mutual insurance company, proprietary interests or policy holder status of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, and mutual savings associations of governmental securities.

It should be noted that necessity may override an otherwise disqualifying situation. For example, where an emergency matter requires immediate judicial action and the otherwise disqualified judge is the only one available, the judge may proceed. The same would be true where all judges would have an economic interest in the outcome, such as litigation involving a judicial salary statute.

d. If the spouse or near relative of a court employee, such as a court reporter, bailiff, or other employee who is under the judge's direction and control, appears as an attorney, litigant or material witness, the judge does not need to recuse but must instruct the affected employee not to participate at all in the proceedings. Indiana Commission on Judicial Qualifications Advisory Opinion #4-89. The judge should also consider whether the judge's "impartiality might reasonably be questioned," Canon 3(E)(1), and should disclose the circumstances on the record.

e. Upon recusal, T.R. 79(H) requires a special judge to be selected under the court's local rule for selection of special judges as approved by the Indiana Supreme Court.

2. Where the judge knows too much about the case under Canon 3(E)(1)(a).

The personal knowledge that requires a judge to recuse is knowledge acquired from extrajudicial sources. Lee v. State, 735 N.E.2d 1169 (Ind. 2000). Therefore, personal knowledge that the judge acquires from participation in a case, as opposed to extrajudicial sources, does not require recusal. Matter of Adoption of Johnson, 612 N.E.2d 569 (Ind.App.1993). Again, however, the overriding test found in Canon 3(E)(1) must be considered.

a. Situations requiring recusal:

(1) Personal bias or prejudice as to a party or witness requires disqualification. However, a judge does not have to disqualify solely on

the basis that a party has filed a disciplinary complaint against the judge. Nor does the mere fact that a litigant has filed a civil suit against a judge mandate the judge's recusal. *See*: In Matter of the Appointment of a Special Judge in the Wabash Circuit Court, 500 N.E. 2d 751 (Ind. 1986), where a litigant had filed a civil suit against the judge and the Court held that automatic recusal under those circumstances would lead to the success of sham proceedings for the sole purpose of getting a different judge. The Court indicated that the judge should determine if the claim has any reasonable basis and, if not, the judge should not disqualify. If the claim does have a reasonable basis, the judge should disqualify under Canon 3. For example, if a litigant files a complaint falsely asserting that a judge took a bribe, the judge need not disqualify on that basis alone. On the other hand, if the complainant files a complaint accurately reporting that the judge lost his or her temper at the last hearing and stormed out of the courtroom during the session, then the judge probably should disqualify.

(2) Personal knowledge of disputed evidentiary facts. See, for example, Stivers v. Knox County Dept. of Public Welfare, 482 N.E.2d 748 (Ind.App.1985), where, following a juvenile court judge's impermissible participation in a child protection team meeting prior to hearing a termination of parental rights proceeding instigated by the child protection team, recusal of the judge or change of venue was warranted; and

(3) Previous statements of opinion by the judge about the case or issue. But see Gary v. State, 471 N.E.2d 695 (Ind. 1984), where it was held that statements a trial judge made at the defendant's prior sentencing hearing upon a theft conviction to the effect that the limited incarceration the defendant had been sentenced to previously had not done him any good at all, and "at the rate you're going, you're going to spend the best part of your life in jail," did not demonstrate a showing of personal bias on the part of the trial judge in defendant's subsequent prosecution for robbery, and thus, the court did not abuse its discretion in denying the defendant's motion for a change of judge.

b. Procedure: Per T.R. 79(H), use the court's local rule to select a special judge.

3. Your former cases.

a. If you have been a material witness concerning the matter before you, or if you served as a lawyer in the matter, or if, during your association with her or him, a lawyer with whom you previously practiced law served as a lawyer in the matter, Canon 3(E)(1)(b) requires you to disqualify.

b. This problem affects virtually every new judge and will continue to arise for many years to come, especially if you had a domestic relations practice or were a IV-D prosecutor.

c. Former prosecutors should be aware of Indiana Commission on Judicial Qualifications Advisory Opinion # 3-89 which concludes that former elected prosecuting attorneys are disqualified as judge from any criminal case commenced during the judge's tenure as prosecutor and are disqualified from any case built on an underlying offense if the prosecution was begun during the tenure as prosecutor. The same restriction does not necessarily apply to former deputy prosecutors so long as they were not involved at all in the prosecution. Further, a judge who was involved in unrelated prosecutions of a defendant is not necessarily disqualified from proceedings involving the same defendant.

d. Procedure: T.R. 79(H) applies once again and a special judge should be selected under the court's local rule.

e. In some urban counties the sitting bench will continue to disqualify in all cases where former partners are before court. This is not required by the Code of Judicial Conduct except as to the interpretation of the general rule of Canon 3(E)(1): "A judge shall disqualify … in a proceeding in which the judge's impartiality might reasonably be questioned …" Note, however, that Canon 3 **requires** recusal where, for example, a judge has a case which a former partner handled during the time they were partners. In Indiana, unlike some other states, this is a mandatory disqualifying situation, it may not be waived by opposing counsel or the parties. The Counsel for the Indiana Commission on Judicial Qualifications recommends that judges disqualify for a minimum of six (6) months after taking the bench and disclose to opposing counsel for another six (6) months. At a minimum, during the first year on the bench, in those situations where recusal in not mandatory, disclosure of a former relationship should be given to all parties on the record so that they may seek a change of judge if they so desire. In addition, if the judge continues to have a financial relationship with former partners or associates, either because they continue to receive fees, or, for example, where a building is owned together with the former associates, then the judge should disclose the relationship for as long as that financial relationship continues.

4. Probate.

a. In addition to any other grounds for disqualification, Indiana Code § 29-1-1-6 makes the following special provisions for disqualification of judges in **controverted** probate matters:
(1) The judge or the judge's spouse is related to any party or any lawyer within the third degree of kinship (see *ante.* except for no mention of spouses of relatives);
(2) The judge is interested in or has been counsel in any probate proceeding involving the matter; or
(3) The judge drew the will of the decedent.

b. Although the above are grounds for disqualification, the statute does not require automatic recusal. Canon 3(E)(1), however, must be considered.

c. Procedure: The judge may recuse, or any person interested in the matter may request disqualification and then the judge must act. The method for obtaining a special judge is not clear; however, it is suggested that the court's local rule for selection of a special judge should be utilized as in other disqualifications for possible self-interest.

5. Mandate of funds cases.

a. The procedures specified in T.R. 60.5 must be followed.

b. Immediately upon issuance of the show cause order, the judge must notify the Indiana Supreme Court, which will then appoint a special judge.

6. Your own election case.

a. Indiana Code § 3-12-8-20 prohibits a judge from presiding over her or his own election contest. Within three (3) days after a contest petition is filed in your court, the statute requires you to certify your disqualification in the case to the **governor** who is to select a special judge.

b. The selection of a special judge by the governor would appear to contravene T.R. 79. It is possible that the Indiana Supreme Court would consider this a procedural matter that would be controlled by the Rules of Trial Procedure. It is recommended that you not only certify your disqualification to the governor but also notify the Supreme Court as well and let these co-equal branches of government sort it out.

B. A judge does not have to disqualify merely because the judge previously filed a disciplinary complaint against an attorney in the case. The test is whether the judge has a bias against the attorney. Blackwell v. State, 502 N.E.2d 899 (Ind. 1987). The Canon 3E(1) standard also applies.

80.02 COURTROOM ETHICAL DILEMMAS

A. Motions to disqualify opposing counsel

1. Motions to disqualify an attorney from participating in a case are not favored. Such motions could be used regularly to create delay and harassment of the opposition. The competing interests are that while protecting the relationship with one client, another party is being separated from their chosen attorney. "Disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary." Freeman v. Chicago Musical Instrument Co., 689 F. 2d 715 (7th Cir. 1982).

2. Motions to disqualify are addressed to the sound discretion of the trial court. The rules regarding conflicts of interest were developed for use in disciplinary proceedings, not disqualification proceedings. The trial judge's primary responsibility is to conduct the proceedings upon the issues before the court with all appropriate due process considerations. Cases granting disqualification refer to the dangers of "taint through the inadvertent use of unfair advantage." See: Cheng v. GAF Corp., 631 F. 2d 1052 (2d Cir. 1980) vacated for other reasons, 450 U.S 903, 101 S.Ct. 1338, 67 L. Ed 2d 327.

3. In dealing with disqualification motions on grounds that opposing counsel has a conflict, such a remedy should be allowed only in those situations where there is a substantial relationship between the instant case and the affected attorney's previous employment.

    a. Rule 1.7 of the Rules of Professional Conduct for attorneys addresses representation against a present client (on a different, unrelated matter, of course). Representation is permitted only if the new representation will not adversely affect the lawyer's representation of the other client's interests **and** both clients consent after consultation.

    b. Rule 1.9 of the Rules of Professional Conduct deals with representation against a former client. Here, the representation may not be on a "substantially related" subject unless the former client consents after consultation or unless any confidential information has become generally known. Exceptions also exist relating to Rule 3.3 (candor toward a tribunal) or Rule 1.6 disputes between a lawyer and a client or where revealing confidences may be necessary to prevent a criminal act.

    c. Of special interest to judges, Rule 1.11 relates to successive government and private employment and Rule 1.12 concerns former judges and former arbitrators. An attorney may not later act in a matter in which the attorney "participated personally and substantially" unless everyone affected (including the governmental agency the attorney represented, if under Rule 1.11) consents. Appearance of impropriety considerations weigh heavily in these cases. "Personally and substantially" is defined at some great length in ABA Formal Opinion 342 (1975) which is quoted in Kessenich v. Commodity Futures Trading Commission, 684 F. 2d 88, 96 (D.C.Cir. 1982). For future consideration, after reviewing a case under Rule 1.12, you may conclude that, following your days on the bench, your marketability as an attorney will be limited as to any firm that regularly practiced in your court. To hedge against this problem, you may want to become familiar with "Chinese Walls." They are discussed in the Prentice-Hall two volume set The Law of Lawyering and in the BNA/ABA Manual on Professional Conduct.

4. In the area of criminal representation, the judge may have a greater duty to inquire into a conflict of interest when a lawyer represents two defendants who

are charged with crimes arising out of the same incident. "[I]t is prudent at least to inquire in greater detail as to the defendant's understanding of potential areas of conflict. Here, these included the risk that defenses may not be fully aligned, and that evidence exculpatory of one may be inculpatory of another." Latta v. State, 743 N.E. 2d 1121 (Ind. 2001).

5. Imputed Disqualification: Rule 1.10 of the Rules of Professional Conduct provides that if any member of a firm is disqualified, then all members of the firm are disqualified.

6. Rebuttable Presumptions: In consideration of conflict of interest problems, a judge should presume:

   a. During a former or current representation, confidences were disclosed which bear on the current representation.

   b. Individuals in a law firm freely share information. If the attorney attempts to overcome this presumption, valid considerations include:

      (1) Size of the firm;

      (2) The attorney's area of specialization;

      (3) The attorney's position in the firm; and

      (4) The demeanor and credibility of witnesses on the issue.

   c. No fee or actual representation is necessary to create these problems. A client who has consulted with a firm, revealing confidences related to the current case, who then hires another firm, is entitled to protection under these rules. This situation presents a field ripe for misuse of the disqualification rules. Sophisticated clients may effectively disqualify specific firms from representing other parties by manipulating the initial interview. After being burned once, many larger firms have dramatically limited the scope of the initial interview.

7. The granting or denying of a Motion to Disqualify is interlocutory. Whether the appellate courts wish to consider these issues (because of the attendant delay and potential for abuse) has been the subject of numerous interesting opinions. This issue is best left to the appellate courts (a determined litigant will probably seek a mandamus anyway). On the topic, see: Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368, 101 S. Ct. 669, 66 L.Ed. 2d 571 (1981).

8. Defenses to this kind of motion include:

   a. Reminders of movant's heavy burden. This motion is disfavored as noted *ante.*

b. By various affidavits, counsel may attempt to prove that their firm has a "Chinese Wall" shielding certain attorneys from particular cases where a conflict would otherwise be created. The essential ingredients are proof that the attorney has not participated in any manner including any discussions concerning the case and that the attorney will not share in any fee from the matter with affiliated attorneys.

B. Attorney of the Case as a Witness – Rule 3.7 of the Rules of Professional Conduct

1. A lawyer shall not act as an advocate at a trial in which he is likely to be a necessary witness except where:

   a. The testimony is on an uncontested issue;

   b. The testimony concerns the nature and value of legal services in the case; or

   c. Disqualification would work a substantial hardship on the client.

2. At issue is the danger to the trial process of the combined role of the attorney-witness. Witnesses are supposed to reveal personal knowledge. Attorneys are supposed to be advocates. There is a potential for confusion about whether testimony is factual or is analysis and about the proper scope of cross-examination.

3. The "substantial hardship" test described above clearly calls for the court to balance the competing interests and pragmatically determine the least harmful course.

4. Whether the problem could have been foreseen is relevant. Where counsel knew or should have known of the need for testimony, the attorney should not be able to benefit from the attorney's delay in raising the issue.

5. Possible procedures include:

   a. Court conducts direct examination;

   b. Brief recess for a partner to arrive for questions, objections, etc.;

   c. An agreed statement of facts, similar to what might be accomplished under the missing witness continuance rule: T.R. 53.5;

   d. Declaration of mistrial, with assessment of costs, if appropriate; or

   e. Denial of the request to call the attorney as a witness.

C. Judge as Witness

1. Justices, while engaged in hearing or determining any trial, are privileged from obeying any subpoena to testify. Indiana Code § 34-29-2-1 (4). Note that the statute specifies justices only.

2. Where you become aware that you may be legitimately called as a fact witness in a case over which you are presiding, recusal is required.

3. Where needed to testify about some event during the trial, or where the necessity of the trial judge's personal knowledge becomes apparent only during the trial, judicial notice of the event or an agreed statement of facts similar to what might be arranged under the missing witness continuance rule (T.R. 53.5) is appropriate. It is difficult to conceive of circumstances where the presiding judge should be subject to examination or cross-examination during a case (who would rule on the admissibility of the evidence?).

4. A judge may testify as a character witness, if subpoenaed, only if the judge is confident that he or she is in a unique position to testify *vis a vis* the person whose character is in issue. If the judge is subpoenaed as a character witness because of the judicial title and not because the judge, irrespective of his or her office, is uniquely qualified to speak to the person's character, to testify would constitute an abuse of office.

D. *Ex parte* Communications

" A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding, …" Canon 3(B)(8).

Every judge who has been on the bench for more than a few months has been exposed to *ex parte* communications. It may be in the form of a hand written letter marked "Personal and Confidential" which turns out to be written by a mother on behalf of her son who is before you for sentencing. Or it may be the passionate pleading of a battered spouse who fears her husband and pleads with you not to reveal to him what she is telling you in her letter. These and other types of *ex parte* communications are frequent challenges that judges must be constantly looking for and address in an appropriate way so as to avoid violating Canon 3(B)(8) and yet not appear to be inaccessible to the public who does not understand the ethical constraints under which judges labor.

It is important that you establish procedures and make sure that all court personnel (including the clerk and deputy clerks) are familiar with the procedures in dealing with *ex parte* communications, whether in written form or in the situation where a member of the public shows up and wants to speak to the judge in person about a case. Some judges have designated an experienced staff person to screen all *ex parte* communications and take appropriate action such as notifying the attorneys of the communication or referring the matter to an agency that can address the concerns; e.g., child protection services. Other judges feel that the public expects the judge to be accessible to and personally address their concerns. These judges will receive the information and take appropriate action.

The appellate courts recognize that judges cannot be removed from their communities and live in ivory towers:

> Although the law requires that a judge be fair and impartial, trial judges cannot realistically be removed from their communities and placed in a pristine atmosphere to await the next defendant with whom they have had no prior contact or information… In our system of jurisprudence, trial judges are frequently faced with the task of filtering out extraneous information and remaining neutral and detached. Green v. State, 676 N.E. 2d 761 (Ind. App. 1996).

1. Procedure:

   Since judges are unable to avoid all *ex parte* communications it is important to understand what steps should be taken when exposed to such communications in order to keep faith with Canon 3(B)(8).

   a. Determine the impact of the communication on your impartiality.

      If your impartiality might reasonably be questioned, such as where you have extra-judicial knowledge of disputed facts concerning the proceeding, you must recuse. Canon 3E(1)(a).

   b. Disclose the *ex parte* communication.

      Canon 3(B)(8)(a)(ii) requires prompt notification to all parties of the communication. Also, Canon 3(E)(1) Commentary provides that a judge must disclose **on the record** any information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Disclosure becomes problematic in those situations where the *ex parte* communication the judge received is of a sensitive nature or was revealed under the belief that the information would be kept confidential by the judge. Disclosing on the public record the nature of the communication might compromise the communication and possibly place the communicator in danger of physical harm. In such cases the judge may want to disclose the communication to the lawyers for the parties in chambers under an order not to reveal the nature of the communication to their clients. The record could then show the fact that an *ex parte* communication from a named person was received by the court and communicated to counsel for the parties under order not to reveal the contents and that the court determined that the *ex parte* communication has not created a bias or prejudice against any party on the part of the judge and that the court will not consider the information contained in the communication in any court proceeding. The communication itself, if in written form, should be sealed, marked "confidential" and kept under seal in the case file. It may also be referred to an appropriate agency.

If one of the attorneys believes that a motion to disqualify should be filed, the judge should discuss with all counsel the procedure for a hearing on the motion so as to avoid compromising the communicator of any sensitive information.

2. *Ex parte* Communication From Attorneys – Canon 3(B)(8)(a)

   Although the Code of Judicial Conduct provides that judges should refrain from permitting or considering *ex parte* communications from attorneys, the appellate courts will assume that judges will disqualify if there is any reasonable question concerning their impartiality. In the absence of evidence or testimony demonstrating that a trial judge's impartiality was compromised as a result of such communications, the court will refuse to find error. Garage Doors of Indianapolis, Inc v. Morton, et al, 628 N. E. 2d 1296 (Ind. App. 1997). Communication with lawyers is permitted, where circumstances require, for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits. James v. State, 716 N.E. 2d 935 (Ind. 1999); or where no actual bias could be demonstrated on the part of the judge as a result of the communication. Lawson v. State, 664 N.E. 2d 773 (Ind. App. 1996). Examples of cases where *ex parte* communications between an attorney and a judge have not led to a finding of unethical conduct are: Stephenson v. State, 742 N.E. 2d 463 (Ind. 2001); James v. State, 716 N.E. 2d 935 (Ind. 1999); and Lawson v. State, 664 N.E. 2d 773 (Ind. App. 1996). Cases that reach the opposite result include: Matter of Johnson, 658 N.E.2d 589 (Ind. 1995) and Matter of Bean, 529 N.E.2d 836 (Ind. 1988).

   a. The judge must reasonably believe that no party will gain a procedural or tactical advantage as a result of the communication. Canon 3(B)(8)(i).

   b. The judge must also make provision to promptly notify all other parties of the substance of the *ex parte* communication and allow an opportunity to respond. Canon 3B(8)(ii). See also, Matter of Bean, *supra*.

   c. Emergency orders and *ex parte* temporary custody orders under T.R 65(B) have come under increasing scrutiny by the Supreme Court and the Indiana Commission on Judicial Qualifications. It is important to note that duties are placed on both the attorney and the judge in such cases. First, the motion for TRO must be verified or have an accompanying affidavit from which it clearly appears that the irreparable injury and emergency aspects of the Rule are satisfied. Then, the judge must ascertain that the attorney has complied with the T.R. 65(B) requirement of certification by the attorney **in writing** the efforts, if any, which have been made to give notice and the reasons supporting the attorney's claim that notice should not be required. Finally, the TRO granted without notice must be endorsed with the date and hour of issuance, filed and entered of record forthwith and must define the injury and state why it is irreparable and why the order was granted without notice. In re Anonymous, 729 N.E. 2d 566 (Ind. 2000).

      Advisory Opinion #1-01 of the Indiana Commission on Judicial Qualifications addresses the abuse of *ex parte* child custody orders and sets

out very limited circumstances under which such an extreme remedy may be allowed by a judge. In essence, the Advisory Opinion states that in child custody cases attempts to obtain such orders must be accompanied by strict compliance with the provisions for notice or waiver thereof contained in T.R. 65 (B). All judges who exercise domestic relations jurisdiction should become intimately familiar with this Advisory Opinion and In re Anonymous cited above.

3. *Ex parte* communications with witnesses and third parties.

   a. The same considerations apply to communications with witnesses and third parties as with other kinds of *ex parte* communications. The judge must disclose the communication on the record and assess the impact the communication had on the judge. Where a judge conferred with the Sheriff's office to reschedule the inspection of a breath-testing device prior to a DWI trial, the Court of Appeals found no prejudicial effect. Mahradt v. State, 629 N.E.2d 244 (Ind. App. 1994). Where a judge received a letter from the natural mother whose children were being adopted, the judge was not required to recuse. In the Matter of the Adoption of Johnson, 612 N.E.2d 569 (Ind. App.1993). Similarly, a judge's impartiality was not compromised when he received letters from individuals connected with "Citizens for Decency Through Law." Austin v. State, 528 N.E.2d 792 (Ind. App.1988).

   b. It was held to be reversible error when a judge engaged in *ex parte* communications with an expert witness in a case. Later testimony of the expert did not cure the appearance of impropriety. Matter of Guardianship of Garrard, 624 N.E.2d 68 (Ind. App. 1993). However, a contrary result was reached by the Indiana Supreme Court in Timberlake v. State, 753 N.E. 2d 591 (Ind. 2001). There, the court found that where a judge advised a psychiatrist of a defendant's objections to the continued use of the doctor as an expert and provided the doctor with a copy of the filed objections, the judge did not engage in inappropriate *ex parte* communications since the judge reasonably believed that neither side gained a tactical advantage and he notified both parties of the communications.

   c. Although a judge may seek advice from disinterested experts on the law, including professors and other judges, notice to the parties of the person consulted and the substance of the advice and a reasonable opportunity to respond must be given per Canon 3(B)(8)(b). Of course, a judge should refrain from talking with another judge about a pending case in the other judge's court if the intent is to influence the other judge's decision. See: In the Matter of Sauce, 561 N.E. 2d 751 (Ind. 1990). Similarly, a judge may not recommend to another judge that a criminal defendant receive lenient (or, presumably, severe) treatment at sentencing. Advisory Opinion #5-91. Commentary to Canon 2(B) provides that a judge must not initiate the communication of information to a sentencing judge, but may provide information for the record in response to a formal request.

d. For additional examples of cases where judges have been disciplined for conducting *ex parte* communications with third parties see: In the Matter Of Sanders, 674 N.E.2d 165 (Ind. 1996); and In the Matter of Lewis, 535 N.E. 2d 127 (Ind. 1989).

E. Self-Represented (*pro se)* Litigants and Canon 3(B)

With the proliferation of free and easily accessed information on virtually every subject available on the Internet, it is no wonder that judges, even at the appellate level, are seeing an increase in the number of self-represented litigants ("SRLs"). In dealing with the self-represented, judges are required to perform a balancing act between the right to full access to the judicial process through the courts on the one hand and the prohibition against providing legal advice on the other. The Indiana Pro Se Project has taken on the task of creating user-friendly forms which satisfy the requirements of Indiana Law and which should be accepted by courts throughout the State. The Project's mail and web addresses are listed in the Resources section of the Appendix to these materials. Although there is little guidance for the trial judge in dealing with SRLs, there are a few practical suggestions that may be helpful.

1. In a non-adversarial proceeding (e.g. change of name), a judge may not require SRLs to adhere strictly to formal requirements but must provide assistance to the litigant in order that the desired result is accomplished. Advisory Opinion # 1-97.

2. Establish a plan or systematic approach for dealing with SRLs and make certain the court staff and the clerk's staff are familiar with the boundaries between permitted assistance and legal advice.

3. Be flexible. Establish a comfort level for your dealings with SRLs but be aware that different types of proceedings may require different approaches. For example, you may not want to advise an unrepresented party in an undisputed dissolution that he or she may be entitled to a share of the other's pension but where it appears that a property settlement agreement deviates from the presumptive 50/50 split, you may wish to advise the disadvantaged party on the record that there is such a presumption and that the agreement in question does not adhere to that presumption. This would allow for the party to acknowledge that he or she is aware of and agrees to the deviation. This approach, however, may be inappropriate where there is a deviation from the normal child support obligation since a parent may not waive the child's right to receive proper support. A judicially prepared child support worksheet to determine the correct amount of support would be appropriate.

4. Do not become an adversary or an advocate. Be patient and avoid the appearance of partiality.

5. Be prudent in your comments and maintain a positive attitude.

6. Judges have some latitude in dealing with SRLs. Case law and ethics opinions recognize the difficulties a judge faces in maintaining the balance between access and impartiality.

7. The Appendix to this section contains an article reprinted by permission of the Michigan Judicial Institute that will help you and your staff delineate the distinctions between legal advice and legal information. Although this article may not be distributed to the general public, your staff and the clerk's staff may use it for their reference.

F. The Judge's role in Dealing with Unethical Attorneys

1. The pre-trial phase.

a. Issues of conflict of interest and motions to remove an attorney from a case can crop up as ethical questions judges may have to wrestle with at the pre-trial phase of litigation. The factors involved in potential conflict situations have been addresses above.

b. Pre-trial publicity (particularly in high profile cases) may present additional challenges to a judge. Rule 3.6 of the Rules of Professional Conduct prohibits attorneys from making any "extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." The Rule contains some examples that might fall within the described prohibition.

c. Dilatory practices were addressed in Matter of Shull, 741 N.E.2d 743 (Ind. 2001) where a lawyer attempted to claim delays caused by his failures to appear for hearings as acceptable tactics to gain a dismissal of criminal charges against his client. The Supreme Court disagreed, even though the criminal charges against the client were eventually dismissed. The Court was understandably concerned about the lawyer's defiance of court orders to appear and the waste of judicial resources it caused.

d. Undue criticism of judges is prohibited not only in the Rules of Professional Conduct (Rule 8.2), but also in the Oath of Attorneys that all lawyers take when admitted to the bar. An example of a lawyer who went out of bounds in commenting publicly about a judge is found in Matter of Reed, 716 N.E. 2d 426 (Ind. 1999). See, also: Matter of Atanga, 636 N.E.2d 1253 (Ind. 1994) and Matter of Garringer, 626 N.E.2d 809 (Ind. 1994).

2. The trial phase.

a. The "elephant in the room" that nobody may talk about during a typical civil jury trial is that insurance interests hire the attorneys. The quickest route to a mistrial is to utter the "I" word. However, in Stone v Stakes, 749 N.E. 2d 1277 (Ind. App. 2001), the Court of Appeals, in a non-disciplinary case, held that lawyers who were employed as in-house or "captive" counsel for an insurance company were properly denied a mistrial after opposing counsel told the jury pool that the attorneys were from the "litigation section of the Warrior Insurance Group." Presumably under the same

circumstances, an attorney would not be violating the Rules of Professional Conduct with such a statement to a jury pool.

b. The duty to disclose controlling and possibly harmful information to the court is the subject of Rule 3.3(a)(3) of the Rules of Professional Conduct. This rule requires lawyers to disclose controlling legal authority, if not disclosed by the opposing party, even though it might be adverse to their client. A public reprimand was imposed on an attorney who failed to comply with this requirement in Matter of Thonert, 649 N.E.2d 1022 (Ind. 2000).

c. Courtroom decorum has been addressed by the Supreme Court in several disciplinary rulings. Of note are Matter of Ortiz, 604 N.E.2d 602 (Ind. 1992) where Ortiz became unruly following an adverse ruling to the point that he struggled with a deputy sheriff, and Matter of Crumpacker, 383 N.E.2d 36 (Ind. 1978) where the respondent engaged in behavior which ultimately resulted in his disbarment.

d. Canon 3(D) of the Code of Judicial Conduct states:

(1.) A judge who receives credible information indicating a substantial likelihood that another judge or a candidate for judicial office has committed a violation of this Code **should** take appropriate action. A judge having knowledge that another judge or judicial candidate has committed a violation of this Code that raises a substantial question as to that person's fitness for office **shall** inform the appropriate authority. (*emphasis added.)*

(2.) A judge who receives credible information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct **should** take appropriate action. *(For example, a judge who observes that a lawyer is chronically late, or unprepared, or even impaired in some way, might choose to meet with the lawyer, express the judge's concerns, and, in the case of possible impairment, urge the lawyer to contact the Judges and Lawyers Assistance Program.)* A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects **shall** inform the appropriate authority. (*emphasis and example added.)*

(3.) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3(D)(1) and 3(D)(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

e. Rule 23, Section 11.1 (a)(1) of the Rules for Admission to the Bar and the Discipline of Attorneys requires the judge of any court in which an attorney is

convicted of a crime to, within ten (10) days after the conviction, transmit a certified copy of the judgment of conviction to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

f. A copy of the Request for Investigation form used by the Indiana Supreme Court Disciplinary Commission can be found in the Appendix to these materials.

80.03 OTHER ETHICAL CONSIDERATIONS

A. Political activities permitted for judges and candidates for judicial office.

Indiana politics in general is replete with misrepresentations, hyperbole, promises and rhetoric. Judges and candidates for judicial office, however, operate under a different set of rules. See: Canon 5. The restrictions of Canon 5 must be read in conjunction with the United States Supreme Court's decision in Minnesota Republican Party vs. White, 122 S.Ct. 2528 (June 27, 2002), which struck down a Minnesota Supreme Court canon of judicial conduct which prohibited a candidate for judicial office from announcing "his or her views on disputed legal or political issues." This canon, which differs from our own Canon 5(A)(3) language, was held to violate the First Amendment. In the wake of Minnesota Republican Party vs. White, the Indiana Commission on Judicial Qualifications, in Preliminary Advisory Opinion # 1-02, has provided some guidance to judges and candidates for judicial office. That preliminary opinion begins by emphasizing that the "announce clause" which the U.S. Supreme Court found unconstitutional was removed from our Canon 5 in 1993. Therefore, candidates for judicial office may announce their views on disputed legal or political issues, however, they may not make pledges and promises of conduct in office [Canon 5(A)(3)(a)], or make statements which commit or appear to commit them with respect to cases likely to come before them [Canon 5(A)(3)(d)(ii)]. All candidates for judicial office should carefully read Preliminary Advisory Opinion # 1-02 as well as any future opinions from the Commission on the subject. As Opinion # 1-02 emphasizes, any doubts about what is or is not appropriate campaign speech for judicial candidates should be referred to Counsel to the Commission.

Although the remedy for a breach of ethics in the heat of a political battle may come after the election has been decided, judges and judicial candidates who are subject to public election would be well advised to know the parameters of proper political activities and make certain that their families, employees, and all campaign workers know and understand these limits. Convincing the electorate that you are not hiding behind an ethical smokescreen when, for example, you refuse to state your position on abortion (see Indiana Commission on Judicial Qualifications Advisory Opinion # 2-90) or other politically charged issues is a challenge which all judges face. It should be noted that where campaign violations occur, the Commission generally acts on an expedited basis because of the potential time-sensitivity of the problem.

All judges and candidates for elected or appointed judicial office, within one (1) week of publicly announcing candidacy or of declaring or filing as a candidate with the election or appointment authority, or of authorizing the solicitation or acceptance of contributions or support, whichever occurs first, must notify the Indiana Commission on Judicial Qualifications in writing of the fact of the candidacy, of the office sought, and of the candidate's address or telephone number. Canon 5(A)(4).

It should be noted that the rules discussed below do not pertain to judges who are appointed or subject to retention vote. These judges are even more restricted in their political activities.

1. What You May Not Do.

    a. A judge may not act as a leader or hold an office in a political organization.

    b. A judge may not make speeches on behalf of a political organization.

    c. A judge may not solicit funds for a political organization.

    d. A judge may not permit the judge's employees and officials subject to the judge's direction and control to be candidates for or hold positions as officers of a political party's central committee or to be candidates for or hold non-judicial, partisan elective offices.

    e. A judge may not make pledges or promises of conduct in office except for the faithful and impartial performance of the duties of the office. It is, however, permitted to expand somewhat on this mantra. For example, judges or candidates may make comments to the effect that they believe an impartial judiciary is critical to the public's confidence, or that they pledge to consider all the facts before ruling, or that they will give every litigant a fair hearing, Other similar comments may also be permitted. And it is always permissible to make promises relating to court administration, or to promise such thing as to always rule promptly, or to institute a night court, or to seek funding for additional probation officers, or other similar local issues.

    f. A judge may not make statements that appear to commit the candidate to a particular position with respect to cases, controversies or issues likely to come before the court. For example, a judge may not publicly state a view on abortion (Advisory Opinion # 2-90), or promise a tough stance against criminals [Matter of Spencer, 759 N.E.2d 1064, (Ind. 2001)].

    g. A judge may not knowingly misrepresent the identity, qualifications, present position or other fact concerning a candidate, or an opponent. In this regard see Matter of Bybee, 716 N.E. 2d 957 (Ind. 1999) where a candidate for judge, by selectively using court statistical reports, knowingly created the false impression that the incumbent judge was causing needless delays and holding large numbers of cases under advisement.

h. A judge may not personally solicit or accept campaign contributions or personally solicit publicly stated support.

i. A judge may not use campaign funds for private benefit of the judge or of others.

j. A judge may not become a candidate for a non-judicial office (except delegate to a constitutional convention) unless the judge resigns the judicial office.

k. A judge may not engage in most political activities in those years the judge is not a candidate for election.

2. What You Can Do.

a. A judge may respond to personal attacks on the judge's record so long as the response does not include things the judge may not say or do.

b. A judge may purchase tickets for the judge and one guest for, and attend, gatherings of political organizations.

c. A judge may identify with a political party.

d. A judge may contribute to a political party.

e. A judge may appear in media advertisements supporting the judge's candidacy.

f. A judge may speak to gatherings on behalf of the judge's candidacy.

g. A judge may distribute promotional campaign literature supporting the judge's candidacy.

h. In a campaign year, a judge may publicly endorse and attend gatherings for other candidates in the same public election in which the judge is running, and may purchase tickets for the judge and a guest to attend the gatherings, including fund-raisers for other candidates. Advisory Opinion # 1-93.

i. A judge may establish committees or designate responsible persons to conduct a campaign including the solicitation and acceptance of reasonable campaign contributions from all sources including attorneys. Fund solicitation can take place no earlier than one (1) year before the primary election and no later than ninety (90) days after the general election.

3. Political Activities of your Spouse

a. The Code of Judicial Conduct does not personally bind judicial spouses. However, it is the view of the Commission on Judicial Qualifications that a

spouse running for office creates the potential for problems for the judge of which the judge and the spouse should be aware.

b. Even in those years when the judge is not a candidate for public election, the judge's spouse may still endorse and campaign for political candidates and even conduct fund-raisers in the home. However, the judge must not be present at or associated in any way with these activities.

c. Although judicial spouses may put campaign signs on property jointly owned with the judge, it may be difficult for the judge to be disassociated with such an endorsement; therefore, unless the sign clearly indicates that the sign represents only the spouse's views and not the judge's, yard signs and bumper stickers should be avoided.

4. Political Activities of your Employees.

a. Employees of the court are free to participate actively in political campaigns during non-working hours. However, as stated above, no employee can be a candidate for or hold partisan elective office. If an employee declares for elective office, the employee must take an unpaid leave of absence and resign if elected. NOTE: this does not apply to non-partisan offices. Also, employees may seek elected office in their own political party so long as it is not a position in the party's central committee (Advisory Opinion #5-90), and may run for membership of a Township Advisory Board. Advisory Opinion # 3-91.

b. Political activities of any kind (including displaying of signs, buttons or other political materials) during scheduled work hours or, presumably, in the court environs are prohibited. Advisory Opinion #1-90.

c. The prohibition against employees seeking election does not extend to court referees, magistrates, commissioners, special masters or other employees performing judicial functions who become candidates for judicial positions. Advisory Opinion # 4-90.

B. Family Ethics

1. Civic and Charitable Activities

a. Judges personally may not solicit funds or participate in other equivalent fund-raising activities for civic and charitable organizations except from co-equal colleagues; however, a judge may donate money, attend most fund-raising events, assist in planning fund-raising activities, and help behind the scenes. See Advisory Opinion #1-96 and Canon 4(C)(3)(b)(i).

b. Judges may attend but may not be a speaker or guest of honor at an organization's fund-raising event.

c. Other family members may solicit funds so long as the judge is not identified in any way with the solicitation.

2. Financial Activities

a. A judge may hold and manage investments, owned solely by the judge or jointly with other family members, so long as this activity may not reasonably be perceived to exploit the judge's judicial position, involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court, or tend to reflect adversely on impartiality or interfere with the proper performance of judicial duties.

b. A judge may preside in typical collection cases involving a bank that holds a judge's ordinary commercial loan or mortgage. Advisory Opinion #3-93.

c. A judge should discourage family members from engaging in dealings that would reasonably appear to exploit the judge's judicial position.

d. Except under the limited circumstances described herein, a judge shall not accept, and shall urge persons residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone. Judges are free to accept gifts that constitute ordinary social hospitality, and gifts from relatives and friends that are commensurate with a special occasion, such as a birthday or wedding. Gifts of excessive value, however, may not be accepted from anyone, lawyer or litigant, whose interests have come or are likely to come before the judge. Canon 4(D)(4). Also, remember the annual reporting requirements for gifts in the Statement of Economic Interests.

3. Acting as an Attorney for Family Members

a. A judge may:

(1.) Give uncompensated legal advice and counseling to family members;

(2.) Draft or review documents for members of the judge's family so long as the judge does so without compensation; and

(3.) Attend a deposition or other legal proceedings to offer moral support as a spectator, without directly or indirectly lending advice or assistance, if the judge is likely to remain unknown and the proceeding was in a court in which the judge does not sit.

b. A judge may not make an appearance as counsel or function as an advocate or negotiator in a legal matter on behalf of a family member even if the judge receives no compensation and the judge's representation requires no courtroom appearance.

4. The Judge as a Fiduciary

    a. A judge may usually serve as a fiduciary for a member of the judge's family, including a spouse, child, grandchild, parent or grandparent or possibly some more distant relative if a close relationship exists. Advisory Opinion #5-89. Note that "Family member" has been defined as anyone with whom the judge has a close familial relationship. In some situations, therefore, a judge may act as a fiduciary for someone who is not a relative but with whom the judge is particularly close and, typically, for someone who does not have other family members who could act as fiduciary instead.

    b. The service must not take away from the proper performance of judicial duties.

    c. The judge's service must not force the trust to divest holdings that require the judge to disqualify frequently from cases if the divestiture would harm the trust.

    d. It must be unlikely that the judge, as fiduciary, would become involved in proceedings that would ordinarily come before the court.

5. Nepotism

    a. In considering hiring a relative or friend, a judge must consider the degree of the judge's relationship to the prospective employee or appointee, as well as whether the position is lucrative, is full-time or part-time, permanent or temporary, and the degree to which the judge would supervise the employee. The decision to hire must be based primarily on merit, and the judge must give others the opportunity to apply. Advisory Opinion #2-98. The Indiana Commission on Judicial Qualifications suggests that judges who are considering hiring a relative contact the Commission first to discuss the propriety of the hire. Further, the Commission has stated that the hiring of a spouse is unlikely ever to be approved.

    b. If a court employee becomes related to a judge through the marriage of the judge or the employee, the employee can probably retain the employment.

    c. If a new judge is related to a long-time court employee, the employee can probably retain the employment.

    d. A judge may not appoint a family member as counsel for indigent defendants in criminal cases.

    e. A judge may not appoint a relative to serve in a case in a position such as guardian ad litem, receiver, trustee, administrator, referee, master, mediator, commissioner, or pro tem judge.

f. A judge may not appoint as defense counsel or fiduciary an attorney who is affiliated with a family member, for example, as a law partner.

C. Other Ethical Considerations in Brief

1. A judge shall not commend or criticize the verdict of a jury except in a court order or written opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community. Canon 3(B)(11). See, also: Noble v. State**,** 725 N.E.2d 842 **(**Ind. 2000).

2. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Canon 2(C) and Advisory Opinion # 1-94.

3. A judge shall not require an employee to perform personal services for the judge as a condition of employment. In re Neely, 364 S.E.2d 250 (W.Va. 1987).

4. A judge shall not use the judicial office to obtain favorable treatment or lenience. For example a judge should not identify herself or himself as a judge upon being stopped by a law enforcement officer.

5. A judge shall not accept appointment to any governmental committee, commission or other governmental position that is concerned with issues of fact or policy other than the improvement of the law, the legal system or the administration of justice unless the judge receives the prior approval of the Indiana Supreme Court. Canon 4(C)(2).

6. A judge shall not publicly comment on a pending or impending proceeding in any court even when the proceeding is at the appellate level. Canon 3(B)(10).

7. A judge may not use the power of the office to advance the judge's, or others', private interests. Canon 2(B).

80.04 CONCLUSION

The materials presented above are not an exhaustive compendium of the ethical issues judges face nor do they necessarily represent the opinion of the Indiana Supreme Court or the Indiana Commission on Judicial Qualifications. Although adherence to recommendations contained in Advisory Opinions of the Indiana Commission on Judicial Qualifications does not necessarily constitute compliance with the Code of Judicial Conduct, it will be considered a good faith effort to comply with the Code. It is suggested that the best source for resolving ethical questions is the Canons themselves. The Appendix contains information for locating a copy of the Judicial Code of Conduct. In addition, the Counsel for the Indiana Commission on Judicial Qualifications is always available to provide informal guidance to judges. An ounce of prevention is worth a pound of cure, so without a doubt the Counsel and the Commission would much prefer that judges seek guidance before acting in a manner that might violate the Canons.

80.05 APPENDIX

A. CODE OF JUDICIAL CONDUCT

The Code of Judicial Conduct can be found on the internet at:

www.in.gov/judiciary/rules/jud_conduct/index.html

B. REQUEST FOR INVESTIGATION

The form to make a Request for Investigation can be found on the internet at:

www.in.gov/judiciary/agencies/Grform.pdf

C.

LEGAL ADVICE

V

LEGAL INFORMATION

Do YOU Know the Difference?

The attached article is provided as a model to help the staffs of Indiana courts in providing information to the public and access to the Indiana court system. It has been prepared by the Michigan Judicial Institute and it is copyrighted. It is not to be copied and it is not to be distributed further.

Indiana Supreme Court Pro Se Project
115 West Washington Street, Suite 1080
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http://www.in.gov/judiciary/selfservice/index.html

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LEGAL ADVICE

V

LEGAL INFORMATION

Do YOU Know the Difference?

Introduction

Every day every clerk in every court in every state is bombarded with questions about courts, procedures, judges and cases. Most court clerks have been told they cannot give legal advice when answering questions. Many courts have posted signs informing the public that court clerks are not allowed to give legal advice. And probably every clerk in every court in every state has, at one time or another, repeated the phrase, "I'm sorry. I'm not allowed to give legal advice."

Do you know what information can be provided and what information would be considered legal advice?

Can a clerk tell parties whom they should sue?

Can a clerk tell a party what form to use?

Can a clerk tell parties what their options are?

If you don't know the answers, don't worry because you are not alone.

Clerks in courts across the country have questions about what is and isn't legal advice.

Purpose of this Training:

This training is designed to help court staff understand the types of information they can provide. It is specifically designed for court support staff who provide telephone and counter assistance as a major part of their job duties.

This training will cover three areas:

- The reasons court clerks cannot provide legal advice;
- Guidelines for determining what is and is not legal advice; and
- Commonly asked questions

Why Court Clerks Are Not Allowed to Give Legal Advice

Although court clerks are told that they cannot give legal advice, they usually do not know why. There are several reasons:

1. **Neutrality**[i]: Court clerks must remain neutral and cannot promote or recommend a particular course of action. Even though a clerk may have processed hundreds of similar types of cases, he or she is not in a position to know what is in a litigant's best interest. Only litigants or their attorneys can make that determination.

2. **Impartiality**[2]: Court clerks have an "absolute duty of impartiality". A court employee can "never give advice or information for the purpose of favoring one court user over another." This is very important because court clerks have considerable knowledge about the way in which their court functions. That knowledge must be shared fairly and in a manner that does not involve the disclosure of confidential or ex parte communication. "Advising a party 'what to do' rather than 'how' a party might do what it has already decided crosses the line from impartiality to partiality, from providing permissible information to giving prohibited 'legal advice' or engaging in the unauthorized practice of law."

3. **Unauthorized practice of law:** Every state has laws prohibiting the unauthorized practice of law. Only attorneys licensed by the state are permitted to practice law and give legal advice. Since court clerks are generally not attorneys, they cannot give legal

advice because giving legal advice is considered the unauthorized practice of law. If a court clerk were an attorney, he or she should still not give legal advice as an employee of the court because it would violate the concepts of neutrality and impartiality.

[1] *The Ethics Field Book: Tools for Trainers*, Cynthia Kelly Conlon, J.D., Ph.D. Funded by a grant from the State Justice Institute, ©American Judicature Society, 1995.

[2] *The Ethics Field Book: Tools for Trainers*, ibid.

The Importance of Understanding What Is and Is Not Legal Advice

Every day court clerks are bombarded with questions about courts, procedures, judges, and cases. Their job involves providing information to the different people that request or require it, including the general public, attorneys, parties, legal secretaries and paralegals. Each has different levels of understanding and different needs. Court clerks must help all of them while staying impartial and neutral and without giving legal advice. How they respond to the questions they are asked affects how the public views the court system. How they respond will most certainly affect the attitude of the public during their court involvement. And, how they respond could affect the outcome of a case. An accurate understanding of a court clerk's primary functions makes it clear that it is important to know what is and is not legal advice.

1. **Providing Access:** Most people are not familiar with courts and court procedures and must depend to a large degree on court clerks for information on the court system. As a result, court clerks play a very important role as a "gatekeeper" providing access into the court system. If people do not know how to use the system and court clerks do not tell them, they are being denied access.

2. **Providing Service:** An important duty of all court employees is to provide service to the public. Providing information is a very important part of providing service. Therefore, it is important to understand what information can be provided and what information cannot.

3. **Pro Se Litigants:** An increasing number of people are representing themselves and are not being represented by attorneys. The burden will fall on court support staff to be able to assist these parties without crossing the legal advice line.

Guidelines for Determining What Is and Is Not Legal Advice

"How do I know what is and isn't considered legal advice?" This is perhaps the number one question asked by court clerks, and there is no easy answer. Court clerks have a tremendous amount of knowledge about the court system and are supposed to provide information as part of their duties. But how are they supposed to know what information they can provide and what information they cannot? How can they know when they are crossing the invisible legal advice line?

Unfortunately there is never going to be a book or manual that clearly identifies every question court clerks get asked and what questions they can or cannot answer. However, there are some very specific guidelines that can be used to help define the legal advice line.

TABLE 1. Legal advice guidelines for court clerks

Can Provide	Cannot Provide
Legal definitions	Legal interpretations
Procedural definitions	Procedural advice
Cites of statutes, court rules and ordinances	Research of statutes, court rules and ordinances
Public case information	Confidential case information
General information on court operations	Confidential or restricted information on court operations
Options	Opinions
Access	Deny access, discourage access or encourage litigation
General referrals	Subjective or biased referrals
Forms and instructions on how to complete forms	Fill out forms for a party

TABLE 2.	
Can provide ***legal definitions***	**Cannot provide** ***legal interpretation***
Reason: Legal terminology can be confusing and difficult. Providing definitions of legal terms or procedures helps the public understand the court system and does not involve the unauthorized practice of law.	**Reason:** Court clerks cannot provide legal interpretations because it would be considered the unauthorized practice of law and would violate the concepts of neutrality and impartiality.
Example: What is child abuse?	**Example:** My neighbors leave their kids home all day without supervision. Is that child abuse?
Response: According to this dictionary of legal terms, child abuse is "the mistreatment of a minor by an adult legally responsible for the minor."	**Response:** I am not an attorney and cannot make a legal interpretation. However, I can refer you to someone that can help you.
Tip: Resources for providing legal definitions include statutes, court rules and a dictionary of legal terms.	

TABLE 3.	
Can provide ***procedural definitions and explanations***	**Cannot provide** ***procedural advice***
Reason: Court procedures can be confusing. Explaining various procedures increases the public's understanding of the system and does not violate the concept of neutrality.	**Reason:** Court clerks cannot give procedural advice, because in doing so they may favor one party over another or may encourage or discourage a party from a particular course of action. Court clerks must remain impartial and neutral at all times. Clerks can, however, point out various factors that individuals can consider to make the decision themselves.
Example: What happens at an arraignment?	**Example:** Whom should I sue?
Response: The arraignment is the first appearance before the court. Defendants are notified of the charges and informed of their rights, including the right to an attorney, bond is set, and a plea may be entered.	**Response:** I cannot tell you whom to sue because I cannot give you legal advice. If you aren't sure who to sue, who do you feel owes you the money?
Tip: Whenever you hear the word "should", it is a tip that you are being asked for advice.	

TABLE 4.	
Can provide ***cites for statutes, court rules and ordinances***	**Cannot provide** ***research of statutes, court rules and ordinances***
Reason: A court clerk may cite the legal authority for a specific procedure.	**Reason:** Court clerks cannot research statutes, court rules and ordinances for parties because it would be considered the unauthorized practice of law and violates the concepts of impartiality and neutrality.
Example: An employer asks if the employer has to file a disclosure with the court every time an employee's paycheck is garnished.	**Example:** Please provide me with a copy of all of the laws regarding stalking.
Response: No. The court rules only require a disclosure to be filed within 14 days after the date the writ was served.	**Response:** I'm sorry, but I am not allowed to do legal research.
Tip: Have copies of court rules and most commonly used statutes available. In determining what is considered research, consider whether the material or information requested is something that should be known as a part of the clerk's job and whether the information is readily available or would require compilation.	

TABLE 5.	
Can provide ***case information that is a matter of public record***	**Cannot provide** ***confidential case information***
Reason: Court clerks can provide case information that is public. Most court records are considered public records and, therefore, are available to the public.	**Reason:** Court clerks cannot disclose non-public or confidential information. It is very important that clerks understand what information is confidential.
Example: Is there an estate file open for Beth Hall?	**Example:** May I see the Kramer adoption file?
Response: Yes, there is. It is a public record. Would you like to see it?	**Response:** I'm sorry. Adoption files are confidential and not able to be viewed by the public.
Tip: If asked about a confidential record, a court clerk may confirm its existence but cannot provide any other information. **Note:** If you are not sure what records are public and which records are confidential in your court, check with your supervisor.	

TABLE 6.	
Can provide ***general information about court operations***	**Cannot provide** ***confidential information about court operations***
Reason: Court clerks have considerable knowledge and information about how a court functions. Sharing this knowledge of general court operations is not considered legal advice.	**Reason:** Court clerks cannot disclose confidential information about court operations or ex parte communications because it can give one side an unfair advantage.
Example: How long before I become the guardian?	**Example:** How do I get a particular judge assigned to my case?
Response: Hearings generally are scheduled in four to six weeks, and a determination is made at that time.	**Response:** I'm sorry, I can't give you information about the court's internal assignment procedures.
Tip: Is the information sought for the purpose of having knowledge of the court's policies and/or procedures, or is the client hoping to get an advantage through the information? For example, if parties have confidential information about a court's case assignment procedures, they could "judge shop".	

TABLE 7.	
Can provide ***options***	**Cannot provide** ***Opinions***
Reason: Court clerks can provide information on the various procedural options available and can explain how to do something.	**Reason:** Court clerks cannot give an opinion on or otherwise advise parties to use a particular procedure or remedy.
Example: How can I collect my judgment?	**Example:** Should I file a writ of garnishment or a writ of execution?
Response: You have several options. If you know where the defendant is employed or has a bank account, you can file a request for a garnishment. If you know of property that they own, you can file a request for a lien. Otherwise, you can file a discovery subpoena to determine what assets, if any, they have.	**Response:** I can explain the difference between the two types of writs, but I cannot tell you what to do or give you an opinion on which option to select. That's a decision you have to make.
Tip: Telling someone "how" to do something does not usually cross the legal advice line. Telling someone what he/she "should" do does cross the legal advice line.	

TABLE 8.	
Can ***facilitate access***	**Cannot** ***deny or discourage access, nor encourage litigation***
Reason: Most people are not familiar with the court system. They often cannot describe their problem in legal terms. Court clerks are the gatekeepers to the system. It is their job to ensure that the court system is accessible. The information that is presented, and the manner in which it is presented, can affect how accessible the system is.	**Reason:** Most people are not familiar with court procedures or terminology. Legal advice should not be used as an excuse not to provide service. If the question is not asked in the right way, take the time to clarify what is being asked.
Example: How do I *convict* my renter?	**Example:** How do I take care of a civil *infection?*
Response: Do you want to evict your renter? The court that handles landlord/tenant disputes is down the hall.	**Example:** Civil infections are handled by the health department.
Tip: In the examples above, the client was using incorrect terminology. Often it is necessary for a court clerk to ask questions to determine what the client is really asking rather than make an inappropriate referral. (Examples include the mistake of identifying Mr. Pro Se Litigant as an attorney rather than realizing it is an indicator that a party is acting on his/her own behalf, incorrect usage of guardian vs. custodial parent, etc.)	

TABLE 9.	
Can provide ***general referrals***	**Cannot provide** ***subjective or biased referrals***
Reason: General referrals can be made to agencies and associations that can provide additional information and assistance. Sometimes people call the court when they don't know whom to call.	**Reason:** Court clerks must remain neutral and impartial and cannot make referrals to specific individuals.
Example: I'm not sure I'm calling the right place, but I need to talk to someone about my birth certificate.	**Example:** Can you give me the name of a good criminal attorney?
Response: Let me give you the phone number for the county department of health.	**Response:** I can't refer you to a specific attorney, but you might want to check the yellow pages. Most Bar Associations are listed and some attorneys list their areas of specialty there.
Tip: Good general referrals include yellow pages and local bar associations.	

TABLE 10.	
Can ***distribute forms and instructions on how to complete forms***	**Cannot** ***fill out forms <u>unless</u> there is a handicap or physical disability that prevents the person from filling out the form***
Response: Court clerks must facilitate access to the court system.	**Response:** Court clerks should not fill out forms for parties because it violates the principles of neutrality and impartiality. However, there may be some situations where it is appropriate for clerks to record information on a form. Some examples include language barriers (illiteracy or foreign language) and physical handicaps (blindness or deafness).
Tip: The following is a recommendation for handling these situations: 1. Exhaust all other possibilities first. Is there someone with them who can assist? Is there a literacy council that provides volunteers, or is an interpreter available? 2. If there are no other alternatives, the clerk must record exactly what is said, confirm the information with the party, make a notation on the document, and have the party sign the form. 3. If possible, it is recommended that a witness, such as another clerk, be present to witness. **Note:** This is a very difficult issue. Although courts have an obligation to facilitate access and are required under the Americans with Disabilities Act to accommodate individuals with disabilities, courts also have an obligation to remain neutral and impartial.	

Conclusion

When court clerks realize that most of the questions they are asked all into the nine categories we have discussed, it is much easier for them to accurately draw the "legal advice" line and understand what is and what is not legal advice. With that understanding, clerks can provide access to the courts and service to the public while remaining impartial and neutral.

D. ORDER FORM FOR "AN ETHICS GUIDE FOR JUDGES & THEIR FAMILIES"

"An Ethics Guide for Judges & their Families" can be ordered from the American Judicature Society via the internet at:

www.ajs.org/cart/thumbnail.asp?subject_id=2

Additional resources and contact information for the American Judicature Society can be found in the Resources at the end of this section.

E. RESOURCES

1. Counsel for the Indiana Commission on Judicial Qualifications:

Ms. Meg Babcock
115 West Washington Street, Suite 1080
Indianapolis, Indiana 46204-3466
(317) 232-4706
mbabcock@courts.state.in.us

2. "An Ethics Guide for Judges & Their Families"

Published by:
American Judicature Society
180 N. Michigan Ave., Suite 600
Chicago, Illinois 60601
(312) 558-6900 Ext. 147

In addition to the above referenced publication, the American Judicature Society has several other publications with information on judicial ethics.

3. American Judicature Society ethics web site:

www.ajs.org/ethics/index.asp

4. The Indiana Pro Se Project

115 West Washington Street, Suite 1080
Indianapolis, Indiana 46204 – 3466
www.in.gov/judiciary/selfservice/

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"An Ethics Guide for Judges & their Families, order information	80.05(F)(2)
Counsel for Indiana Comm. on Judicial Qualifications	80.05(F)(1)
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